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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VERNELL DEVON BUSH,

Defendant and Appellant.

D053565

(Super. Ct. No. SCS207478)

APPEAL from a judgment of the Superior Court of San Diego County, Peter E. Riddle, Judge. Affirmed in part; reversed in part.

A jury convicted Vernell Devon Bush of two counts of grand theft (Pen. Code,¹ § 487, subd. (c)); three counts of second degree robbery with personal use of a firearm (§§ 211, 12022.53); one count of carjacking (§ 215); and one count of receiving stolen property (§ 496). As to one of the robbery counts, the jury found true a criminal gang sentence enhancement. (§ 186.22, subd. (b)(1).) The court sentenced Bush to 40 years in

¹ All further statutory references are to the California Penal Code unless otherwise indicated.

state prison, including a 10-year consecutive term for the criminal street gang enhancement.

Bush contends (1) the jury's gang enhancement finding is not supported by substantial evidence; (2) the court prejudicially erred by admitting expert opinion testimony regarding his specific intent to promote, further, or assist criminal conduct by gang members; and (3) his conviction for receiving stolen property must be reversed because a person cannot be convicted of simultaneously stealing and receiving the same property. We conclude substantial evidence supports the jury's finding on the criminal street gang enhancement allegation, and although the court erred in admitting the expert's opinion regarding Bush's specific intent, the error was harmless. We reverse the conviction for receiving stolen property.

FACTS²

On December 8, 2006, shortly before 8:00 a.m., Bush approached Karla Madrigal, who was sitting in her car parked on Solola Avenue in the Lincoln Park area of San Diego. Madrigal was not from the neighborhood, but was talking on her cell phone while waiting to visit an aunt who lived there. Bush approached the car, dressed in red shorts and black shirt, and asked Madrigal if she was waiting for someone. Madrigal responded by rolling up the window of her car. Bush left, then came back and asked if she knew the time. Madrigal pointed to her car clock and continued to talk on her cell phone in

² Both the jury's true finding as to the gang enhancement and Bush's conviction of receiving stolen property are based on the same incident, the robbery of Karla Madrigal. Our recitation of the facts therefore focuses on that incident.

Spanish, which Bush could not understand. Bush then lingered on the street nearby. Shortly thereafter, Madrigal got out of her car and crossed the street to enter the parking lot of her aunt's apartment complex, when she heard footsteps and looked back to see Bush running toward her and pointing a gun at her. He asked Madrigal, "What the hell are you doing here, bitch?" and said "This is not your territory," or "you're in the wrong territory." Bush took Madrigal's cell phone away from her and said, "Give me your purse." When she resisted, he pointed the gun to her head and said, "Give me your purse or I will blow the hell out of you." Madrigal pulled her wallet and \$1,200 in rent money out of her purse, and Bush took them. She then walked away while Bush continued to point the gun at her. Bush kept Madrigal's wallet, cell phone and \$1,200.

Bush was tried on charges of robbery and receiving stolen property arising out of the Madrigal incident, along with felony charges arising from three other incidents in which he was involved. The amended information charged Bush with criminal street gang enhancements pursuant to section 186.22, subdivision (b)(1) in connection with four felony counts (three robberies and one carjacking).

During trial, the prosecution presented expert testimony from Detective William Cahill of the San Diego District Attorney's Office Gang Prosecution Unit regarding two gangs, the 5/9 Brim and Lincoln Park gangs. Cahill testified that the two gangs were allies, and both were known to frequent the area in which Madrigal was robbed. Members of the gangs would "put in work" — or commit crimes — in that area to generate respect for themselves within the gang. Greater respect was obtained by committing bold, brazen or violent acts, such as robbery and carjacking. Commission of

such crimes served to enhance the gang's fearsomeness in the community. After testifying generally about his knowledge and experience with the 5/9 Brim and Lincoln Park gangs, Cahill offered three opinions.

First, Cahill opined that Bush was a documented 5/9 Brim gang member. He based this opinion on Bush's criminal record, contacts with other gang members, the "Brim" tattoo on Bush's arm, the nature of the crimes with which Bush was charged, and a 2004 field interview by a police officer in which Bush claimed gang membership and wore a "B" belt buckle associated with the Brim gang. Cahill noted Bush had been observed by police associating with members of both gangs in the area where the Madrigal robbery and other crimes on which Bush was being tried occurred.

Cahill next opined that the robbery of Madrigal, and the other crimes with which Bush was charged, were crimes a 5/9 Brim gang member typically would commit to gain respect within the gang, instill fear within the community and benefit the gang. He explained that the Madrigal robbery, for example, took place in an area where the 5/9 Brim gang commonly "put in work," involved a brazen act of intimidation and the putting of a gun to the victim's head, and the wearing of gang colored red shorts (a color associated with the Brim gang, a "Blood" set). According to Cahill, the gang would benefit from the robbery proceeds, which would be used by gang members for partying, buying drugs, buying guns, car rims, stereos or jewelry, and possibly giving money to others less fortunate in the gang.

Cahill finally opined, over objection, that Bush committed the charged offenses "with the intent of promoting the gang and also promoting his reputation within that gang."

Bush testified in his own defense at trial. He acknowledged that he had joined the 5/9 Brim gang when he was 12 years old and still bears a "Brim" tattoo on his right arm, but claimed he left the gang four years earlier. Testifying about his robbery of Madrigal, Bush admitted he was suspicious of Madrigal's presence in the area; that he approached her "out of nowhere, blam"; and that he asked her what she was doing around there, while holding a gun in his hand so that she would see it. Bush also admitted that he took Madrigal's cell phone and told her to "get out of here."

DISCUSSION

I

The Evidence Sufficiently Supports the True Finding on the Street Gang Enhancement

The California Street Terrorism Enforcement and Prevention Act (§ 186.20 et seq.) proscribes certain penal consequences for crimes committed "for the benefit of, at the direction of, or in association with" a criminal street gang.³ (§ 186.22, subd. (b)(1).) Section 186.22, subdivision (b)(1) of the Act provides for an additional prison term to be

³ A "'criminal street gang'" is "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more" criminal acts enumerated in subdivision (e) of the statute, and which has "a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).)

imposed on a defendant convicted of a felony "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (*Ibid.*) In this case, Bush was charged with a criminal street gang enhancement pursuant to section 186.22, subdivision (b)(1) in connection with four felony counts.

To subject Bush to the penal consequences of section 186.22, subdivision (b)(1), the prosecution was required to prove, beyond a reasonable doubt, that the crimes for which he was being tried were "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members."⁴ (§ 186.22, subd.(b)(1); *People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*); *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

On appeal, Bush contends the criminal street gang enhancement imposed for his robbery of Madrigal, the only enhancement allegation found true by the jury, must be reversed because insufficient evidence supports the jury's finding that he committed the robbery (1) for the benefit of, at the direction of, or in association with any criminal street

⁴ Although not at issue in this case, the prosecution also must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period. (§ 186.22, subds. (e), (f).)

gang; and (2) with the specific intent to promote, further, or assist in any criminal conduct by gang members.

We utilize the substantial evidence test to determine whether the prosecution has introduced sufficient evidence to establish the section 186.22, subdivision (b)(1) gang enhancement. (*People v. Ortiz* (1997) 57 Cal.App.4th 480, 484.) Under this standard, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence that is reasonable, credible and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053, citing *People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.) We presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*Kraft*, at p. 1053.) We reverse only if it "appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We will not reweigh the evidence or second-guess the jury's assessment of witness credibility. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) This standard of review applies equally to cases in which the prosecution relies on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

A. *Substantial Evidence Supports the Jury's Finding That Bush Committed the Madrigal Robbery for the Benefit of the 5/9 Brim Gang*

We first consider the sufficiency of the evidence to establish the Madrigal robbery was committed "for the benefit of, at the direction of, or in association with any criminal

street gang." (§ 186.22, subd. (b)(1).) Bush's primary argument is that "except for Detective Cahill's opinion that the robbery could benefit the appellant's reputation in the 5/9 Brim gang, of which appellant denied being a member at the time of the offense, there was no specific evidence connecting the offense with gang activity." We disagree.

That the Madrigal robbery was committed by Bush for the benefit of the 5/9 Brim gang is amply supported by substantial evidence, consisting not only of Cahill's testimony about the character and habits of the 5/9 Brim gang — a customary method of establishing how a crime was committed to benefit or promote a gang — but also by the circumstances of the robbery itself, which establish the crime was done in order to increase the 5/9 Brim's fearsomeness in, and control over, the Lincoln Park community. (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550 ["Expert testimony repeatedly has been offered to show . . . 'whether and how a crime was committed to benefit or promote a gang.'"]; *Gardeley, supra*, 14 Cal.4th at p. 617 [culture and habits of criminal street gangs are proper subjects of expert testimony]; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1207-1208 (*Zepeda*) [affirming admission of gang expert opinion that sole gunman who displayed no gang signs during shooting acted to bolster gang and his own reputation in gang].)

The evidence showed Bush committed the Madrigal robbery in Lincoln Park, wearing 5/9 Brim gang colored clothing, early in the morning when no one would expect it, and by holding a gun to Ms. Madrigal's head — all of which, Cahill testified, would benefit the gang by increasing its fearsomeness in the community. Increasing the gang's fearsomeness benefitted the gang as it helped secure the Lincoln Park "territory" where

gang members performed carjacking and robberies, securing funds for partying and the purchase of guns, car rims, stereos and jewelry. Corroborating the territorial and gang nature of the robbery, Bush himself testified that he was suspicious of Madrigal's presence, asked her what she was doing in the area, while holding a gun in his hand to as to make it visible to Madrigal. (See, e.g., *Zepeda*, *supra*, 87 Cal.App.4th at pp. 1208-1209 [expert opined criminal street gangs rely on violent assaults to frighten the residents of an area where the gang members sell drugs, thereby securing the gang's drug-dealing stronghold]; *People v. Valdez* (1997) 58 Cal.App.4th 494, 508-509.) Given this evidence, the jury reasonably could find beyond a reasonable doubt that the Madrigal robbery was committed for the benefit of the 5/9 Brim gang.⁵

B. *Substantial Evidence Supports Bush's Specific Intent to Promote, Further or Assist Criminal Gang Activity*

We next consider Bush's challenge to the sufficiency of evidence to support the jury's finding that, in committing the Madrigal robbery, Bush had "the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22,

⁵ Bush's reliance here on cases holding a gang enhancement finding should not be based *solely* on gang affiliation or the testimony of an expert to establish the gang-related nature of a crime is thus misplaced. (See *People v. Albarran* (2007) 149 Cal.App.4th 214, 227 [insufficient evidence supported gang-related motive where there was no evidence the alleged gang members announced their presence or purpose before, during or after shooting at an inhabited dwelling and there was no other evidence of a gang motive other than defendant's gang affiliation]; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 [general gang evidence and improper opinion that the knife was carried to benefit gang was insufficient to support concealed knife enhancement]; *People v. Martinez* (2004) 116 Cal.App.4th 753, 762 [insufficient evidence supported finding that unlawful intercourse with a minor was gang related where prosecution relied solely on defendant's criminal record and gang affiliation].)

subd. (b)(1).) Bush contends the trial court improperly admitted the expert's testimony that he acted with the specific intent to benefit the 5/9 Brim gang, and further, without that testimony, there was insufficient evidence to establish his intent. As we explain below, Cahill's opinion regarding Bush's subjective intent in robbing Madrigal should not have been admitted. However, the record contains sufficient evidence, apart from that testimony, to support a finding that Bush acted with the necessary specific intent.

The specific intent showing required by section 186, subdivision (b) is that the defendant intend "to promote, further, or assist in *any* criminal conduct by gang members." (§ 186.22, subd. (b)(1), italics added.) There is no requirement that the defendant intend to enable or promote criminal endeavors by gang members *apart* from the criminal activity defendant himself commits. Thus, the defendant's *own* criminal act can qualify as the gang-related criminal activity. (*People v. Hill* (2006) 142 Cal.App.4th 770, 774 (*Hill*); *People v. Romero* (2006) 140 Cal.App.4th 15, 19 (*Romero*).)⁶ That said, section 186.22, subdivision (b)(1) still requires presentation of substantial evidence from which the jury can infer that in committing the criminal act, the defendant specifically intended to engage in or promote criminal gang conduct.

⁶ Bush contends that the jury lacked evidence of a specific intent to facilitate a crime other than the charged offense, which he contends is required under the statute as interpreted by the Ninth Circuit. (See *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1104 (*Garcia*).) We decline to follow *Garcia*, and agree instead with those California decisions that reject its interpretation of the statute as contrary to its plain language. (*People v. Leon* (2008) 161 Cal.App.4th 149, 162; *Hill, supra*, 142 Cal.App.4th at p. 774; *Romero, supra*, 140 Cal.App.4th at p. 19.)

A finding of specific intent requires a subjective desire. (See 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 5, p. 204.) However, "[i]ntent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense." (*People v. Pre* (2004) 117 Cal.App.4th 413, 420.) Here, the facts and the circumstances of the Madrigal robbery are sufficient to establish Bush's specific intent to engage in and promote gang-related criminal conduct.

Bush was a member of the 5/9 Brim gang. (*People v. Gamez* (1991) 235 Cal.App.3d 957, 965 [upholding admission of police testimony that defendants were gang members], disapproved on another point in *Gardeley, supra*, 14 Cal.4th at p. 624, fn. 10.) In committing the Madrigal robbery, Bush wore 5/9 Brim gang colored clothing, approached Madrigal suddenly with a gun, in an intimidating manner, stating she was "on the wrong territory." These facts were sufficient for the jury reasonably to infer that in committing the Madrigal robbery, a typical crime for the 5/9 Brim gang, Bush wished to further the gang's criminal conduct in its territory. (See, e.g., *Zepeda, supra*, 87 Cal.App.4th at pp. 1208-1209 [holding admissible expert testimony that defendant's asking "'where [are you] from'" before shooting victim had a gang-related motive]; *People v. Partida* (2005) 37 Cal.4th 428, 441 (*Partida*) [gang expert testimony explaining that "'Where you from?'" constitutes a challenge in gang culture] (conc. & dis. opn. of Baxter, J.).) That inference is further bolstered by Cahill's testimony that 5/9 Brim gang members perform such open, brazen crimes to enhance their gang's fearsomeness in the community.

Thus, the jury had sufficient evidence, apart from the improper portion of Cahill's testimony, to find beyond a reasonable doubt that Bush specifically intended to promote criminal conduct by gang members.

II

The Admission of Expert Opinion on Bush's Specific Intent, Even if Erroneous, Was Not Sufficiently Prejudicial to Warrant Reversal

In a supplemental brief, Bush contends that Cahill's testimony regarding his specific intent in committing the crimes constituted inadmissible opinion on the ultimate issue, and that its admission by the trial court requires reversal.

To be admissible, expert opinion testimony must be "[r]elated to a subject that is sufficiently beyond common experience" so that the opinion "would assist the trier of fact." (Evid. Code, § 801, subd. (a).) Opinion testimony is not permitted where it adds nothing "'to the jury's common fund of information,'" or where the jury is as competent as the expert to make a particular factual determination. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300; see *People v. Torres* (1995) 33 Cal.App.4th 37, 45, 47.) Expert opinion evidence properly may be used to establish gang-related motivation, but the courts must exercise caution to ensure that the testimony is "not tantamount to expressing an opinion as to [the] defendant's guilt" or impermissibly speculative as to the defendant's specific knowledge, subjective state of mind or intent. (*People v. Ward* (2005) 36 Cal.4th 186, 210 (*Ward*) [finding no abuse of discretion for admitting expert opinion relating to motivation for defendant's gang-related actions]; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 (*Killebrew*) [holding improper expert testimony that defendant,

along with other individuals, knew of guns and jointly possessed guns for mutual protection].)

Consistent with these principles, courts have concluded that it is not an abuse of discretion to admit expert testimony regarding a defendant's gang-related motivation and expectations so long as it is directed to objective evidence in the case and not to the subjective knowledge or intent of the defendant. (*Ward, supra*, 36 Cal.4th at p. 210 [finding proper hypothetical questions related to why a gang member would go to rival gang territory and likely reactions, where testimony was not tantamount to expressing an opinion on defendant's guilt]; see also *Gardeley, supra*, 14 Cal.4th at p. 619 [holding it proper for prosecutor to give gang expert a hypothetical based on the facts of the crime and asking whether an attack as described would be gang-related]; *Killebrew, supra*, 103 Cal.App.4th at p. 658 [hypothetical questions improperly sought to establish knowledge and intent of gang members].)

Here, the prosecution introduced Cahill's testimony by asking:

"Q. Now, finally, Investigator Cahill, is it your opinion — you have an opinion as to whether or not these acts, these four acts taken in connection with your prior knowledge of Vernell Bush is — your opinion is that he is a documented 5/9 Brim gang member? Were these acts done with the intent of promoting the gang and also promoting his reputation within that gang?"

"A. I think it is. Yes."

This question, as phrased, asked the expert to opine on Bush's actual intent to promote the gang, not on whether the objective facts of the case would tend to show such an intent based on the gang's culture or habits. Thus, the question called for improper and

"impermissible opinion as to defendant's actual intent." (*Ward, supra*, 36 Cal.4th at p. 209.)

Though erroneous, admission of Cahill's opinion on Bush's specific intent was not sufficiently prejudicial to warrant reversal. We may not reverse a judgment due to error in admitting evidence unless it is "reasonably probable that a result more favorable to [Bush] would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Partida, supra*, 37 Cal.4th at p. 439 ["Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test"].) The record here shows it is not reasonably probable the outcome would have been different absent the error.

As we have determined, apart from Cahill's opinion on specific intent, the record provides substantial evidence that Bush had the specific intent to "promote, further or assist" criminal conduct by 5/9 Brim gang members when he robbed Madrigal. In addition, the verdict strongly suggests the jury did not rely solely on the improperly-admitted expert opinion, but conscientiously weighed the evidence. Bush was charged with a criminal gang sentence enhancement on three robbery counts and a carjacking count. Although Cahill expressed the opinion that Bush acted with the specific intent to promote the criminal conduct of the gang as to the crimes described in all four counts, the jury made a true finding on the gang enhancement allegation *only* as to the robbery count involving Madrigal. In so doing, the jury must have differentiated the Madrigal robbery from the other incidents on the basis of evidence other than the inadmissible expert opinion. It is therefore not reasonably probable that the result would have been more

favorable to Bush had his objection to the improper expert testimony been sustained. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 42-43 [finding no reasonable probability of a more favorable outcome where evidence ensured that jury would reach verdict it did].) We therefore conclude that admitting Cahill's opinion regarding Bush's specific intent was harmless error and does not require reversal.

III

Conviction for Receiving Stolen Property

Bush asserts that the court erred in permitting his conviction for receiving stolen property (§ 496) to stand in light of his conviction for second degree robbery (§ 211) of the same property. The People concede the issue, and we agree that the conviction for receiving stolen property should be reversed because a person cannot be convicted for stealing and receiving the same property.

Section 496, which criminalizes the receipt of stolen property, provides that "no person may be convicted both pursuant to this section and of the theft of the same property." (*Id.*, subd. (a).) "[Section 496, subdivision (a)] codifies a common law rule prohibiting separate convictions of the same person for stealing and receiving the same property." (*People v. Garza* (2005) 35 Cal.4th 866, 871, citing *People v. Allen* (1999) 21 Cal.4th 846, 857.)

Bush was convicted of robbery for his taking of Madrigal's cell phone, wallet and money. The charge of receiving stolen property was based on his receiving the cell phone in the same incident. Because Bush does not challenge the sufficiency of the evidence of the greater offense of robbery and the evidence supports that offense, he

cannot also be convicted of the lesser included offense of receiving stolen property.
(*People v. Stephens* (1990) 218 Cal.App.3d 575, 587 [appropriate remedy is to reverse the conviction for receiving stolen property and let stand the conviction for robbery].)
We therefore reverse his conviction on count 9 for receiving stolen property and order it stricken.

DISPOSITION

Bush's conviction for receiving stolen property is reversed. The trial court shall amend the abstract of judgment to delete the conviction of receiving stolen property and advise the Department of Corrections of the amendment. In all other respects, the judgment is affirmed.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.